Supreme Court, U.S.
FILED

No. 04-973 JAN 18 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JESSICA RODRIGUEZ-FREYTAS,

Petitioner,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

LEON FRIEDMAN
Counsel of Record
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400
Attorney for Petitioner Jessica Rodriguez-Freytas

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should this Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) be applied to financial settlements, as held by the Second Circuit in this case and by the Seventh Circuit decision in *Petersen v. Gibson*, 372 F.3d 862 (7th Cir. 2004), or is the *Buckhannon* rule inapplicable to financial settlements, as held by the Ninth Circuit in *Barrios v. California Interscholastic Federation*, 277 F.3d 1128 (9th Cir. 2002).

2. Is a Magistrate Judge's signed endorsement and resolution of a dispute between the parties concerning the terms of a financial settlement a sufficient judicial imprimatur to satisfy the *Buckhannon* rule?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED IN THIS CASE	1
STATEMENT OF THE CASE	2
Introduction	2
PROCEDURAL BACKGROUND	4
The Second Circuit Decision	8
REASONS FOR GRANTING THE WRIT	9
I. THE DECISION BELOW MISCONTRUED THIS COURT'S DECISION IN *BUCKHANNON* BY APPLYING ITS RATIONALE TO A FINANCIAL SETTLEMENT WHERE THE RULE HAS NO APPLICATION	9
A. The *Buckhannon* Decision	9
B. Inapplicability of *Buckhannon* to Financial Settlements	14
II. THE MAGISTRATE JUDGE'S SIGNED APPROVAL OF THE SETTLEMENT AMOUNT PROVIDES THE REQUIRED JUDICIAL IMPRIMATUR	19
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

America Disability Association, Inc. v. Chmielarz, 289 F.3d 1315 (11th Cir. 2002) 22

Barrios v. California Interscholastic Federation, 277 F.3d 1128 (9th Cir. 2002) 4, 18

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001) ..... *passim*

Chemical & Atomic Workers International Union v. Department of Energy, 288 F.3d 452 (D.C.Cir.2002) 22

Hewitt v. Helms, 482 U.S. 755 (1987) 7, 14

Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375 (1994) 16

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 10

Petersen v. Gibson, 372 F.3d 862 (7th Cir. 2004) 4

Roberson v. Giuliani, 346 F.3d 75 (2d Cir. 2003) 21

Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002) 22

Truesdell v. Philadelphia Housing Authority, 290 F.3d 159 (3d Cir. 2002) 22

United States v. Miami, 664 F.2d 435 (5th Cir. 1981) 12

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1988 2

42 U.S.C. § 2000e-5(k) 1

PETITION FOR A WRIT OF CERTIORARI

Jessica Rodriguez-Freytas ("Rodriguez-Freytas") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit on April 27, 2004.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 95 Fed.Appx. 392 (2d Cir. 2004) and is reproduced in Appendix A at App. 1-5. The opinion of the District Court for the Eastern District of New York is unreported and is reproduced in App. B at App. 6-8.

JURISDICTION

The opinion of the United States Court of Appeals Court for the Second Circuit was issued on April, 27, 2004. A timely motion for rehearing was filed on May 10, 2004. The Second Circuit denied the motion for rehearing on October 18, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 2000e-5(k); "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and

the United States shall be liable for costs the same as a private person."

42 U.S.C. § 1988: "Proceedings in vindication of civil rights. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction."

STATEMENT OF THE CASE

Introduction

This case involves the proper application of this Court's decision in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). That case overturned the so-called "catalyst" theory in injunctive cases and held that a party is not a "prevailing party" entitled to attorneys fees under the applicable civil rights statutes unless there was a "judicially sanctioned change in the legal relationship of the parties," 532 U.S. 605. Such a "judicially sanctioned change" includes a judgment or a consent decree.

Buckhannon was a case where a party sought injunctive relief against a specific governmental practice, the practice was changed prior to trial, and the case was dismissed on the grounds of mootness. Since there was no judicial participation of any kind in the final outcome and no continued judicial supervision (as in a consent decree), this Court held that the plaintiff was not a prevailing party entitled to fees. When a case seeking injunctive relief is resolved without judicial involvement, it is difficult to determine whether the law suit actually brought about the final result, this Court held.

The same legal principles should not apply when the suit involved only monetary relief. Once the parties reach a financial settlement in a case, there is no further occasion for a court to participate in the case unless and until a request for fees is made. There is no basis or need for continued judicial supervision and hence no "consent decrees." Parties simply do not ask the court to approve a financial settlement that they themselves have agreed is a fair one. The court has no interest in telling one party or the other whether the financial agreement is fair. Thus a court has no occasion to "approve" a financial settlement in a signed consent decree. Unlike a situation where injunctive relief if agreed upon and a court must supervise the non-financial agreement, nothing must be supervised once payment is made.

In addition, the parties are often reluctant to include the specific amount of a financial settlement in a publicly-filed decree. That makes it even less likely that the court will have any opportunity to review the financial settlement.

However, a judgment can be made on the fairness of the settlement at a later time – when a request for fees is made by the plaintiff. A court should then consider what the plaintiff had sued for and what it received. A court can easily make a judgment (on the later application for fees) whether a party had "prevailed" and is therefore entitled to fees.

Thus none of the considerations that led to the Court's conclusion in *Buckhannon* necessarily apply when a financial settlement is involved.

There is also a split in the Circuits on this issue. Two Courts of Appeal have applied *Buckhannon* to financial settlements: the Second Circuit decision appealed from here and the Seventh Circuit decision in *Petersen v. Gibson*, 372 F.3d 862 (7th Cir. 2004). But the Ninth Circuit came to the opposite conclusion in *Barrios v. California Interscholastic Federation*, 277 F.3d 1128 (9th Cir. 2002). For these reasons, certiorari should be granted to resolve the Circuit split and to examine the implications of *Buckhannon* for financial settlements.

Finally, there was sufficient judicial participation in this case because of the magistrate judge's determination and signed approval of the final settlement amount.

PROCEDURAL BACKGROUND

This action for employment discrimination under Title VII and Section 1983 was commenced on August 18, 1999. The complaint broadly alleged that the defendant New York City Transit Authority ("NYCTA") had established a policy and practice of removing pregnant train operators

from active work shortly after learning that the individual was pregnant, even if the female train operator was not disabled or incapacitated from performing her functions in any way (Second Circuit Joint Appendix "JA" at 5-6). The plaintiff had been removed from her position shortly after she informed the NYCTA that she was pregnant. She lost many weeks of salary and benefits as a result of the policy.

Shortly after the complaint was filed, plaintiff's counsel informed defendant that the case could be settled for approximately the amount of back pay lost by plaintiff because of the discriminatory policy, plus an appropriate amount for emotional distress. The actual demand was for back pay (roughly $17,000) plus $25,000 for emotional distress. That was the exact amount it was finally settled for. (JA-24-25).

The parties engaged in considerable discovery in the case, and there were many disputes that had to be resolved by the Magistrate Judge assigned to the case, Magistrate Judge Joan Azrack.

At one point Magistrate Judge Azrack who was called for and held a settlement conference on January 3, 2001 (see Docket Entry 17, JA-3). At that conference, after considerable discussion back and forth before the Magistrate Judge, the parties agreed to settle the case for five months back pay plus $25,000 for emotional distress damages, with attorneys fees to be determined by the Court. (JA-15). An issue arose whether five months meant 21 weeks or 22 weeks. The parties exchanged many letters on the subject (JA-11-18) and ultimately the issue was left to the Magistrate Judge, who had supervised the settlement conference, to decide. She endorsed the following on one of the letters: "Counsel for Plaintiff has agreed to be

bound by my view. As such I find its twenty-one (21) weeks." (JA-19). Thus the total amount agreed to was $16,518.60 for back pay, plus $25,000 for emotional distress damages for a total of $41,518.60. (JA-17).

On being informed of the settlement, the District Court issued an order as follows, dated February 5, 2001:

> 1. The action is hereby dismissed with prejudice, as the parties have settled it pursuant to a separate agreement.
>
> 2. Plaintiff's rights to apply for counsel fees and costs are reserved and are not waived by this stipulation or in the settlement agreement. (JA-20)

Thereafter, plaintiff's made a timely request for counsel fees (JA-21). All of the counsel fee papers were submitted to Magistrate Judge Azrack (to whom the fee application was referred) by March 9, 2001 (JA-21-43). No decision on fees was made before the *Buckhannon* case was decided.

On May 29, 2001, this Court issued its decision in *Buckhannon*. Counsel for the NYCTA immediately wrote to Magistrate Judge Azrack, bringing that case to her attention and suggesting that no fees should be awarded. Plaintiff's fee counsel responded to that letter on June 12, 2001 (JA-49).

On September 14, 2001, Magistrate Judge Azrack rejected defendant's argument that *Buckhannon* applied. "The instant case does not present a situation analogous to that in *Buckhannon*. Here there was court approval of the

settlement. Indeed Judge Gleeson so ordered the settlement on January 9, 2001.[1] In addition at settlement an issue arose regarding how much back pay plaintiff was due. Both sides agreed to be bound by my recommendation. I thus resolved the dispute on February 8, 2001." (JA-58). The Court reviewed the fee petition and recommended that $14,712.50 in attorneys fees be awarded as well as $407.61 in costs.

Defendant NYCTA then filed objections to the Report and Recommendation only with respect to the *Buckhannon* issue, not with respect to the amount of fees awarded. On October 15, 2001, the District Court adopted the Report and Recommendation in its entirety and granted the amount determined by Magistrate Judge Azrack.

The District Court noted:

> I agree with Judge Azrack that *Buckhannon* is inapposite. *Buckhannon* was a decision involving a declaratory judgment action which became moot upon passage of a law by the state legislature of West Virginia. Here the claim is for money damages under Title VII and § 1983, and thus the case falls outside of *Buckhannon's* holding. It is well-established that settlements achieved with extensive judicial involvement in cases falling under the civil rights statutes can properly lead to an award of counsel fees at the discretion of the district judge. [citing *Hewitt v. Helms*, 482 U.S. 755, 760]. (JA-68-69) (App. 6-7)

[1] The order issued by Judge Gleeson did not "so order" the settlement but merely noted that a settlement had been entered into. See JA-10.

The Court also noted that the case "was settled after more than a year of discovery supervised by Judge Azrack. Judge Azrack oversaw the settlement negotiations and made a finding on the number of weeks of back pay to be paid to the plaintiff as part of the settlement. . . . I conclude that this level of judicial involvement satisfies *Buckhannon's* requirement of a 'judicial *imprimatur*' for the purpose of awarding attorney's fees." (JA-69) (App. 7). The Court then rejected a motion for reconsideration brought by defendant. (JA-71-72). An appeal was then taken to the Second Circuit.

The Second Circuit Decision

The Second Circuit concluded that *Buckhannon* did apply to bar the award of fees.

> The instant case was . . . settled by an agreement negotiated by the parties. Although Ms. Rodriguez-Freytas received a monetary award pursuant to that settlement, it is uncontested that, as in *Needletrades*, "[t]he district court never granted [her] any relief on the merits," nor did "the district court order a consent decree or endorse, or retain jurisdiction over, [the] settlement agreement." 336 F.3d at 206. According to *Buckhannon*, she cannot be considered a prevailing party, and is therefore not entitled to attorney's fees.

A timely motion for rehearing was filed on May 10, 2004. It was denied by the Second Circuit on October 19, 2004.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW MISCONTRUED THIS COURT'S DECISION IN *BUCKHANNON* BY APPLYING ITS RATIONALE TO A FINANCIAL SETTLEMENT WHERE THE RULE HAS NO APPLICATION

A. The *Buckhannon* Decision

The *Buckhannon* case dealt with situations where declaratory or injunctive relief was sought against a governmental practice or policy. If the government changes its policy while the case was pending (as West Virginia did in that case) and the case was then dismissed on the grounds of mootness, this Court held that the plaintiff would not be entitled to fees under a "catalyst" theory.

Thus the *Buckhannon* decision did not involve a settlement of any kind. It involved voluntary action on the part of the defendant (a department of the State of West Virginia) to arrange for amendment of the law challenged in that case. At that point the action was dismissed on the ground of mootness. Everything the Court said with respect to *settlements* – as opposed to dismissals on mootness grounds – is therefore *dicta*.

The whole thrust of the original "catalyst" theory, repudiated by the Court in *Buckhannon*, was that voluntary action by a government defendant to change a policy or practice after a law suit was brought could be attributed to the pressure of the lawsuit, entitling the plaintiff to "prevailing party" status. In one of the first uses of the term, the First Circuit noted: "it is often explained that when plaintiff's lawsuit acts as a 'catalyst' in prompting defendants to take action to meet plaintiff's claims,

attorney's fees are justified despite the lack of judicial involvement in the result." *Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978). Under those circumstances, a court must make certain guesses as to the relationship between the law suit and the voluntary change in conduct by the defendant in order to award fees.

But, as noted below, these considerations simply do not apply when a law suit is brought for money damages, an enforceable settlement agreement is signed, and substantial amounts are paid. The "guesswork" involved in such situations simply does not exist.

Second, the discussion of this Court throughout the *Buckhannon* decision was with respect to *consent decrees*, not *financial settlements*. (As noted below, the only discussion with respect to financial settlements was in a concurring opinion of Justice Scalia and his comments support our position that financial settlements are not covered by the *Buckhannon* rule: "It is true that *monetary settlements* and consent decrees can be extorted as well, and we have approved the award of attorney's fees in cases resolved through such mechanisms." 121 S.Ct. at 1847 (Scalia, J., concurring) (emphasis added)). Thus the Court noted the issue in the case as follows:

> The question presented here is whether this term [prevailing party] includes a party that has failed to secure a judgment on the merits or a court-ordered *consent decree*, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not. 121 S.Ct. at 1838. (emphasis added).

* * *

> [We] have held that settlement agreements enforced through a *consent decree* may serve as the basis for an award of attorney's fees. . . . Although a *consent decree* does not always include an admission of liability by the defendant, see, e.g., id., at 126, n.8, 100 S.Ct. 2570, it nonetheless is a court-ordered "chang[e] [in] the legal relationship between [the plaintiff] and the defendant." . . . These decisions, taken together, establish that enforceable judgments on the merits and court-ordered *consent decrees* create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees. *Id.* at 1840. (emphasis added)

But a "consent decree" involves equitable action of some kind, not an agreement only to pay money damages. The definition of "consent decree" found in Black's Law Dictionary (1979 ed. at 370) makes this point clear.[2]

> *Consent decree.* Agreement by defendant to cease activities asserted as illegal by government (e.g., deceptive advertising practices as alleges by F.T.C.). Upon approval of such agreement by the court the government's action against the defendant is dropped. *Also a decree entered in an equity suit on consent of both parties*; it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court, and in effect in admission by them that the decree is a just determination of their rights upon the real

---

[2] This Court in *Buckhannon* specifically relied upon the Black's Law Dictionary definition of "prevailing party," in arriving at its decision, 121 S.Ct. at 1839. It seems appropriate to use the same dictionary source to determine other aspects of that decision.

> facts of the case, if such facts had been proved. It binds only the consenting parties; and is not binding upon the court. (emphasis added)

The cases discussing "consent decrees" usually focus on the need for continued judicial oversight and possible contempt proceedings, elements that are completely absent when a financial settlement is made. See e.g., *United States v. Miami*, 664 F.2d 435, 439-440, 441 (5th Cir. 1981) (*en banc*): "Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny." (Rubin, J. concurring)

The chief concern of this Court in *Buckhannon* was that cases without merit would be resolved by the governmental actor, because the defendant may be concerned about possible liability for fees at a later time. The plaintiff would then come hat-in-hand with a demand for fees.

The Court focused on what it called the "'merit' requirement of our prior cases" before fees can be awarded. 121 S.Ct. at 1841. It also noted that filing a nonfrivolous suit that escapes a motion to dismiss should not entitle a person to fees. "This is not the kind of *legal merit* that our prior decisions . . . have found necessary." *Id.* at 1840 (emphasis added).

This Court reasoned that without an actual finding on the merits by a decision-maker (a judgment) or without a court-sanctioned *consent decree* supervising the settlement, no fees can be awarded. There was a danger that, without judicial involvement or oversight in the final settlement *involving claims for injunctive or declaratory relief*, a defendant would be forced to pay counsel fees

when a nonfrivolous but nevertheless meritless claim was brought. The Court explained: "We cannot agree that the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." 121 S.Ct. at 1841.

The danger that the Court was concerned about was that governments (in Section 1983 actions or employers in Title VII cases) would agree to afford injunctive relief in cases which had no merit, or that they would refuse to change their conduct because they were afraid that they would then be responsible for fees. The Court noted:

> Petitioners discount the disincentive that the "catalyst theory" may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal. "The defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits," *Evans v. Jeff D.*, 475 U.S. 717, 734, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986). 121 S.Ct. at 1842.

The Court was also concerned with the problem of administering the catalyst theory. It noted that courts would be required to engage in complicated analysis of a defendant's conduct. "Among other things, a 'catalyst theory' hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that 'will likely depend on a highly fact-bound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct.' . . . . [a court

would be required to determine] whether the claim was colorable rather than groundless; whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's *change in conduct*; whether the defendant's *change in conduct* was motivated by the plaintiff's threat of victory rather than threat of expense." 121 S.Ct. at 1843.

The use of language such as "defendant's change in conduct" indicates that the Court was concerned only with injunctive relief, i.e., a change of policy or practice. It was not focusing on the payment of financial settlements, which can hardly be called a "change in conduct."

B. Inapplicability of *Buckhannon* to Financial Settlements

None of the considerations mentioned by the Court in rejecting the catalyst theory apply when a substantial financial settlement is made. This Court had previously noted in *Hewitt v. Helms*, 482 U.S. 755 (1987) about a monetary settlement: "If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has 'prevailed' in his suit, because he has obtained the substance of what he sought," 482 U.S. at 761. In view of this Court's focus only on consent decrees in injunctive actions in *Buckhannon*, and in view of Justice Scalia's concurring opinion, this language still has validity. *Buckhannon's* reasoning, rationale and holding therefore cannot be applied to the present case where only a financial settlement is involved.

First, when the parties to a suit seeking only damages or compensation come to a financial agreement, the court

has no role to play. It does not say to one party or the other, "I refuse to dismiss the case because the amount of the settlement is inadequate (or too much.)" The court accepts the parties' decision that the case is over. Thus there is no occasion for any judicial approval on the settlement. On a later fee petition the court may decide that the amount was too insignificant for a fee award, but that is the only time that a court is in a position to exercise any judgment.

Second, it is difficult to say that a government would pay a substantial amount of money to a plaintiff on a meritless claim – "voluntarily change its conduct" – merely to avoid the payment of legal fees. It may "voluntarily change its conduct" (by passing a new law about nursing homes) for a variety of reasons, which may have nothing to do with the merits of the claim. It may alter its conduct because it was cheaper or more efficient to take such steps or because it was worried about liability or because it was the right thing to do. But it is difficult to believe that a government defendant would "voluntarily" pay a significant damage amount to a plaintiff for any reason other than its concern about its possible liability for a larger amount if the case went to trial.

Third, none of the uncertainty that this Court discussed in *Buckhannon* applies in a financial settlement. This court noted the guesswork that applies when a government takes non-financial steps. "whether the claim was colorable rather than groundless; whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's *change in conduct*; whether the defendant's *change in conduct* was motivated by the plaintiff's threat of victory rather than threat of expense." 121 S.Ct. at 1843. (emphasis added). But it is much easier to determine whether a

claim is "colorable" when a substantial financial settlement is made. All that a court must do (on a later fee petition filed by the plaintiff) is to determine whether the amount paid is significantly related to the amounts claimed.

Fourth, parties rarely if ever include the amount of the settlement in a publicly filed consent decree: "this case is settled by the parties for $250,000. So ordered." The parties do not need the court's supervision in collecting the settlement amount. When a government entity is the defendant, the amount will be paid after various internal approvals are made (by a comptroller's office, for example). And the parties do not need the court's assistance to collect the amount from a governmental entity. Thus they see no need for the court to approve the settlement and retain jurisdiction to insure that the amount will be paid. If the party does not insist on such retention of jurisdiction (as in *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375 (1994), that should not be the deciding factor on whether fees should be paid.

Finally, parties generally do not desire to have the settlement amount disclosed in a publicly filed document. The defendants may not want the amount disclosed because there are other plaintiffs similarly situated who may be bringing suit in the future. And plaintiffs may simply wish to protect there privacy.

Thus, it seems clear that under the *Buckhannon* decision, private *financial* settlements of the type involved here – $41,518.60 of which $25,000 was emotional distress damages – are not subject to the rule announced in that case. The concern of this Court was that government might agree to make certain changes in policy – even with

respect to meritless claims – in order to avoid unnecessary litigation and to avoid unnecessary award of fees. If a judgment was secured or a change in policy was supervised by the Court through a consent decree, then by definition a claim cannot be considered meritless. Why would government subject itself to continuous court supervision of some change in policy if the underlying claim had no merit?

But when substantial monetary settlements are made, the court simply has no right of approval at that point. Once government has paid certain funds to the plaintiff, there is nothing to supervise, and a consent decree becomes meaningless. Thus the entire discussion of private settlements and consent decrees was made only in the context of settlements involving injunctive relief or legislative changes, as in *Buckhannon* itself where a government policy was altered by legislation. The Court's discussion becomes meaningless where a substantial amount of money damages was paid out by a government defendant.

This is shown by the discussion in the concurring opinion by Justices Scalia and Thomas, whose votes were necessary for the majority decision. Justice Scalia noted that: "It is true that *monetary settlements* and consent decrees can be extorted as well, and we have approved the award of attorney's fees in cases resolved through such mechanisms." 121 S.Ct. at 1847 (Scalia, J., concurring) (emphasis added).

Justice Scalia further noted that: "But in the case of court-approved settlements and consent decrees, even if there has been no judicial determination of the merits, the outcome is at least the product of, and bears the sanction of, judicial action in the lawsuit. There is at least some

basis for saying that the party favored by the settlement *or* decree prevailed in the suit." 121 S.Ct. at 1847 (Scalia, J., concurring) (emphasis added). Justice Scalia thus considers private financial settlements to be outside of the rule in *Buckhannon* that a consent decree must be secured before fees can be paid. The financial settlement by itself may serve as the basis for a fee request – "settlement *or* decree."

In one case in which a private financial settlement was made without a court order, the Court of Appeals for the Ninth Circuit did find that the plaintiff was a prevailing party. Thus in *Barrios v. California Interscholastic Federation*, 277 F.3d 1128 (9th Cir. 2002), the plaintiff brought an action under the ADA because he was not allowed to coach a baseball team on the field in his wheelchair. Eventually, pursuant to an agreement between the parties, the defendant federation allowed the coach to resume his duties on the field and paid him $10,000 in damages. The agreement was not court-ordered, but nevertheless the Ninth Circuit found that *Buckhannon* did not bar the payment of attorneys fees. It found that the payment of a $10,000 damage award was a significant victory, and the settlement agreement relating to his coaching on the baseball field could be enforced in court. It also found that the "district court would retain jurisdiction over the issue of attorney's fees, *thus providing sufficient judicial oversight to justify an award of attorney's fees and costs.*" 277 F.3d at 1134, n.5 (emphasis added).

Exactly the same situation applies here. There is sufficient judicial oversight of the settlement when a party seeks attorneys' fees following the financial settlement.

II. THE MAGISTRATE JUDGE'S SIGNED APPROVAL OF THE SETTLEMENT AMOUNT PROVIDES THE REQUIRED JUDICIAL IMPRIMATUR

In addition, as the District Court noted, the judicial approval of the settlement by Magistrate Judge Azrack and her involvement in all aspects of the settlement satisfies this Court's concern about the lack of judicial approval of a settlement. "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, *lacks the necessary judicial imprimatur on the change*." 121 S.Ct. at 1840. The Court also commented that: "Private settlements do not entail the judicial approval and oversight involved in consent decrees." 121 S.Ct. at 1840, n.7.

The *Buckhannon* rule cannot mean that a private financial settlement must be actually incorporated in a dismissal order (the consent decree) signed by an Article III judge before a plaintiff can be considered a prevailing party. Magistrate Judges or District Court judges may become intimately involved in financial negotiations of the parties. A judicial officer often suggest compromise figures that both parties may accept. There are many reasons why that figure may not be contained in a publicly-filed dismissal order – for example, the defendant may not want to reveal publicly what the case was settled for, because others may be in the same position as the plaintiff. Or the plaintiff may not wish the world to know what he or she obtained. But under these circumstances, it cannot be said that the private financial settlement is "meritless" or "lacks the necessary judicial imprimatur on the change."

It would surely be putting form over substance to say that even if a Magistrate Judge or District Court judge

was totally satisfied that a financial settlement was fair and reasonable, that a plaintiff cannot be considered a prevailing party unless the financial settlement was incorporated into the final order dismissing the case.

In this case, Magistrate Azrack was intensively involved in the negotiation and the settlement of this case, and in fact, met repeatedly with both parties on the day of the settlement conference, both separately and together, in order to achieve the settlement. Defendant's counsel admits in the papers filed below that settlement was achieved "through the good offices of the Court (Azrack, J.)." (JA-31, 32). Defendant also noted that "The parties voluntarily settled this case in the course of a settlement conference conducted by Magistrate Judge Azrack on January 3, 2001" (JA-63). In another submission below, defendant noted that settlement was "reached in the course of a settlement conference with Magistrate Judge Azrack on January 3, 2001," (JA-65), it was "reached in the Judge's presence" as defendant admits. (JA-66). Defendant actually expressed its thanks for her help in this matter: It described Magistrate Judge Azrack as a "limited-purpose . . . arbitrator selected by the parties," (JA-66-67) and noted: "The Transit Authority very much appreciated Magistrate Judge Azrack's help in facilitating the parties settling this matter." (JA-67, n.1).

Thus, by defendant's own admission, a judicial officer was instrumental in arranging the settlement. Furthermore, Magistrate Judge Azrack actually signed off on the final settlement amount: "Counsel for Plaintiff has agreed to be bound by my view. As such I find its twenty-one (21) weeks." (JA-19).

Thus, this case did have "the necessary judicial imprimatur on the change," as the Supreme Court noted in *Buckhannon,* 121 S.Ct at 1840. It certainly contained sufficient "judicial approval and oversight," *id.* n.7, to insure that a defendant was not pressured into surrendering in a meritless case in order to avoid paying exorbitant counsel fees. These factors further demonstrate that the *Buckhannon* rationale is inapplicable here.

The case law decided after *Buckhannon* supports this analysis. Many courts have noted that a plaintiff can be a "prevailing party" even if there is no judgment or consent decree. The Second Circuit held in *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d Cir. 2003) that if a court retains jurisdiction to enforce a private settlement agreement, the plaintiff is a "prevailing party" even if the district court judge did not approve the settlement in any way. The Court noted:

> Viewed in the light of *Kokkonen,* the district court's retention of jurisdiction in this case is not significantly different from a consent decree and entails a level of judicial sanction sufficient to support an award of attorney's fees. First, despite the district court's statements that it had not specifically reviewed or approved the terms of the settlement agreement, the district court retained jurisdiction to enforce the Agreement. Under *Kokkonen*, when the district court retained jurisdiction, it necessarily made compliance with the terms of the agreement a part of its order so that "a breach of the agreement would be a violation of the order." 511 U.S. at 381. Further, because the court has the general responsibility to ensure that its orders are fair and lawful, it retains some responsibility over the terms of a settlement agreement as the

> parties' obligation to comply with the agreement was made a part of its order.

346 F.3d at 82.

The Second Circuit noted other situations where courts have gone beyond judgments and consent decrees.

> We therefore join the majority of courts to have considered the issue since *Buckhannon* in concluding that judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees, so long as such action carries with it sufficient judicial imprimatur. *See Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1319 (11th Cir. 2002) ("[T]he district court interpreted *Buckhannon* to stand for the proposition that a plaintiff could be a 'prevailing party' *only* if it achieved one of those two results. That reading of *Buckhannon,* however, is overly narrow."); . . . . *Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy,* 288 F.3d 452, 458-59 (D.C.Cir. 2002) (holding that parties' stipulation and order of dismissal did not "meaningfully alter the legal relationship of the parties," but implying that had there been such a change, *Buckhannon* would not preclude an award of fees); *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) ("We doubt that the Supreme Court's guidance in *Buckhannon* was intended to be interpreted so restrictively as to require that the words 'consent decree' be used explicitly."); *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) ("We do not agree with the District Court's conclusion that the parties' *settlement* was an inappropriate basis for an award of attorney's fees.")

346 F.3d at 81-82.

Under these circumstances, the Magistrate Judge's intimate involvement in the negotiations and her signed determination that twenty-one weeks was the appropriate settlement amount satisfied the "judicial involvement" requirement of *Buckhannon*.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: New York, N.Y.
January 18, 2005

Respectfully submitted,

LEON FRIEDMAN
Counsel of Record
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400
Attorney for Petitioner
Jessica Rodriguez-Freytas

APPENDIX A

United States Court of Appeals, Second Circuit.

Jessica RODRIGUEZ-FREYTAS, Plaintiff-Appellee,

v.

NEW YORK CITY TRANSIT AUTHORITY, Defendant-Appellant.

No. 01-9443.

April 27, 2004.

Appeal from the United States District Court for the Eastern District of New York (Gleeson, J.).

Leon Friedman, New York, NY, for Appellee.

Richard Schoolman, New York, NY, for Appellant.

Present: THOMAS J. MESKILL, JON O. NEWMAN, and ROSEMARY S. POOLER, Circuit Judges.

SUMMARY ORDER

At a stated Term of the United Stated Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 27th day of April, 2004.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is VACATED AND REMANDED.

We are asked on this appeal to review a judicial award of attorney's fees in the context of a civil rights action that was discontinued pursuant to a settlement agreement.

Plaintiff-appellant Jessica Rodriguez-Freytes commenced this action on August 18, 1999, by filing a complaint in the U.S. District Court for the Eastern District of New York. In her complaint, she alleged that the New York City Transit Authority ("NYCTA"), which employed her as a train operator, "ha[d] implemented a custom, policy and practice of removing pregnant train operators from active work shortly after learning that the individual is pregnant and despite the fact that the pregnant individual is not disabled, all of which is done because such train operators are pregnant. Similarly situated non-pregnant train operators are permitted to continue working." [Complaint ¶ 5] The complaint alleges that this amounts to discrimination in violation of the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

The parties eventually negotiated a settlement pursuant to which NYCTA would pay Ms. Rodriguez-Freytes back pay in the amount of $16,518.60, and damages for emotional distress in the amount of $25,000.00, for a total of $41,518.60. Judge Gleeson subsequently issued a "Settlement and Order of Dismissal," which acknowledged the settlement agreement and dismissed the action subject to Ms. Rodriguez-Freytas's reservation of the right to apply for attorney's fees.

Ms. Rodriguez-Freytes subsequently moved for an award of attorney's fees pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k). In a Report and Recommendation, dated September 14, 2001, Magistrate Judge Azrack found that an award in the amount of $14,712.50 was appropriate. This figure was approved by Judge Gleeson in an Order, dated October 15, 2001 ("the October 15th Order").

Numerous federal statutes, including § 1988 and § 2000e-5(k), allow courts to award attorney's fees and costs to the "prevailing party." In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598 (2001), which was decided shortly before the October 15th Order was issued, the Supreme Court considered whether what is commonly known as "the catalyst theory" may serve as a basis for attorney's fees pursuant to these statutes. The catalyst theory asserts that a plaintiff may be considered a prevailing party in a case in which the defendant's voluntary action moots the lawsuit by providing the relief sought by the plaintiff.

The Supreme Court held that the catalyst theory may not serve as a basis of an award of attorney's fees because the phrase "prevailing party" does not "authorize[ ] federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit," achieves a desired result "without obtaining any judicial relief." 532 U.S. at 606. Judicial relief is relief that amounts to a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. Thus, "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.*

In *Buckhannon,* the voluntary action which mooted the lawsuit was the defendant State's unilateral decision to repeal the regulations being challenged in the suit. *Buckhannon,* however, has been read by our Circuit to be applicable to situations in which a lawsuit is mooted by bilateral voluntary action, such as the conclusion of a settlement agreement among the parties which disposes of

all issues raised by the suit. Thus, *Union of Needletrades, Industrial and Textile Employees v. INS,* 336 F.3d 200, 206 (2d Cir.2003), involved a situation in which the parties "jointly reported [to the court] that they had 'settled all of the substantive issues in the case.'" We held that even though the plaintiff "may have accomplished the objective it sought to achieve by initiating" the lawsuit, "its failure to secure either a judgment on the merits or a court-ordered consent decree renders it ineligible for an award of attorney's fees under *Buckhannon." Id.*

The instant case was also settled by an agreement negotiated by the parties. Although Ms. Rodriguez-Freytas received a monetary award pursuant to that settlement, it is uncontested that, as in *Needletrades,* "[t]he district court never granted [her] any relief on the merits," nor did "the district court order a consent decree or endorse, or retain jurisdiction over, [the] settlement agreement." 336 F.3d at 206. According to *Buckhannon,* she cannot be considered a prevailing party, and is therefore not entitled to attorney's fees.

We therefore vacate the October 15th Order. We are, however, sensitive to the fact that the settlement agreement in this case was negotiated pre-*Buckhannon,* when it would have been reasonable for Ms. Rodriguez-Freytas to believe that she was entitled to an award of attorney's fees. In the interests of fairness, we therefore remand this action to the district court with instructions that it afford the parties an opportunity to re-negotiate the settlement agreement in the form of a consent decree over which the district court would retain jurisdiction for the purpose of enforcement. Should either of the parties decline this opportunity, Ms. Rodriguez-Freytas should be given the option to either: (1) cancel the settlement agreement and

proceed toward an adjudication on the merits or (2) confirm the settlement agreement and forgo the attorney's fees awarded to her by the October 15th Order.

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby VACATED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JESSICA RODRIGUEZ FREYTES,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

ORDER

October 15, 2001

99-CV-4974 (JG)

JOHN GLEESON, United States District Judge:

In a Report and Recommendation dated September 14, 2001. Magistrate Judge Joan M. Azrack recommended that the plaintiff in the above action, settled on January 3, 2001, be awarded attorney's fees under 42 U. S.C. § 1988 and 42 U.S.C. § 2000e-5 (k). For the reasons briefly discussed below, I adopt Judge Azrack's Report and Recommendation in its entirety. A copy of the Report and Recommendation, familiarity with which is assumed, is attached.

Defendant objects to the recommended award of attorney's fees on the grounds that plaintiff is not a "prevailing party" for attorney's fees purposes, under the Supreme Court's recent decision in *Buckhannon v West Virginia Department of Health and Human Resources*. 532 U.S. 598, 121 S.Ct. 1835 (2001). I agree with Judge Azrack that Buckhannon is inapposite. Buckhannon was a decision involving a declaratory judgment action which

became moot upon passage of a law by the state legislature of West Virginia. Here, the claim is for money damages under Title VII and § 1983. and thus the case falls outside Buckhannon's holding. It is well established that settlements achieved with extensive judicial involvement in cases falling under the civil rights statutes can properly lead to an award of attorney's fees at the discretion of the district judge. See *Hewitt v Helms*, 482 U.S. 755, 760 (1987) (Scalia, J.) ("It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988.")

This case was settled after more than a year of discovery supervised by Judge Azrack. Judge Azrack oversaw the settlement negotiations and made a finding on the number of weeks of back pay to be paid to the plaintiff as part of the settlement[1] (Exhibit 5 to Defendant's Objections, Letter of Richard Schoolman, Special Counsel for the Defendant, dated February 8, 2001) ("I find it's twenty one (21) weeks.") (Written and signed by Judge Azrack, February 8, 2001)). I conclude that this level of judicial involvement satisfies Buckhannon's requirement of a "judicial imprimatur for the purpose of awarding attorney's fees. 121 S. Ct. at 1840.

---

[1] The majority opinion in Buckhannon implicitly acknowledges that a judicial finding can support an award of attorney's fees. See 121 S. Ct. at 1842 n.9; see also *id.* at 1858 n. 11 (Ginsburg, J. dissenting) ("It nonetheless bears attention that . . . a plaintiff could qualify as the 'prevailing party' based on a finding or retention of jurisdiction.").

Plaintiffs motion for award of attorney's fees is granted.

So Ordered. /s John Gleeson
Dated: October 15, 2001

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S.COURT HOUSE
40 FOLEY SQUARE NEW YORK 10007

Roseann B. MacKechnie CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 18th day of October two thousand four.

JESSICA RODRIGUEZ-FREYTES,
Plaintiff-Appellee,

v.

NEW YORK CITY TRANSIT AUTHORITY,
Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant New York City Transit Authority.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is

DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk By:
Motion Staff Attorney

(2)

No. 04-973

Supreme Court, U.S.
FILED
FEB 22 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JESSICA RODRIGUEZ-FREYTAS,

Petitioner,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

RICHARD SCHOOLMAN
Counsel of Record for Respondent
Office of Martin B. Schnabel,
General Counsel
NEW YORK CITY TRANSIT AUTHORITY
130 Livingston Street
Brooklyn, NY 11201
Tel. [718] 694-4667

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. When the parties to an action seeking compensatory, injunctive, and declaratory relief brought under statutes providing a reasonable attorney's fee to a "prevailing party" reach a settlement involving plaintiff's stipulating to dismiss the action with prejudice and defendant's agreeing only to pay plaintiff a specified sum of money, and the settlement's terms are *not* made part of any court-ordered consent decree (or incorporated in any signed order of dismissal) and the district court has no retained jurisdiction to enforce the settlement's terms, was the Second Circuit correct in holding that, in light of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), plaintiff is not a "prevailing party" and thus not statutorily entitled to an award of attorney's fees?

2. Where negotiation of such a settlement is facilitated by a magistrate judge who was familiar with the case but lacked any decretal power in that case, was the Second Circuit correct in rejecting *sub silentio* the argument that such involvement by a magistrate judge constituted sufficient "judicial imprimatur" (under *Buckhannon*) to make the settling plaintiff a "prevailing party" (even though the settlement's terms were never made part of any court-ordered consent decree or incorporated in any signed order of dismissal, and the district court retained no jurisdiction to enforce the settlement's terms)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
BRIEF IN OPPOSITION	1
OPINIONS BELOW	1
COUNTER-STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	5
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Alegria v. District of Columbia, 391 F.3d 262 (D.C. Cir. 2004) 6

Barrios v. California Interscholastic Federation, 277 F.3d 1128 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002) 7

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001) ..... *passim*

Christina A. v. Bloomberg, 315 F.3d 990 (8th Cir. 2003) 6

Doe v. Boston Public Schools, 358 F.3d 20 (1st Cir. 2004) 6, 7

Petersen v. Gibson, 372 F.3d 862 (7th Cir. 2004) 6

Smalbein v. City of Daytona Beach, 353 F.3d 901 (11th Cir. 2003) 6

Smyth v. Rivero, 282 F.3d 268 (4th Cir.), *cert. denied*, 537 U.S. 825 (2002) 6

Toms v. Taft, 338 F.3d 519 (6th Cir. 2003) 6, 8

STATUTES

28 U.S.C. § 2106 5

42 U.S.C. § 1983 ..... 1, 2

42 U.S.C. § 1988 2

42 U.S.C. § 2000e 1, 2

Fed. R. Civ. P. 40(a)(1)(ii) 2

2d Cir. R. § 0.23 5

BRIEF IN OPPOSITION

Respondent, the New York City Transit Authority ("Transit Authority"), requests that the Court deny the petition for a writ of certiorari submitted by the petitioner, Jessica Rodriguez-Freytes, seeking review of a portion of the summary order of the United States Court of Appeals for the Second Circuit in this case. (If the Court grants the petition, the Transit Authority requests that the Court also grant the Transit Authority's separately filed conditional cross-petition for a writ of certiorari seeking review of another portion of that summary order.)

OPINIONS BELOW

The summary order of the Second Circuit Court of Appeals, as printed in the Appendix to the petitioner's petition and as unofficially reported at 96 Fed.Appx. 392 (2d Cir. 2004), is materially inaccurate. That summary order, with all of the language of that order as actually provided to the parties by the Office of the Clerk of the Second Circuit Court of Appeals (which order was not thereafter amended or corrected), is printed in the Appendix to this brief in opposition.

COUNTER-STATEMENT OF THE CASE

This civil case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and 42 U.S.C. § 1983, was settled, in a common way, by a voluntary agreement between the parties, both represented by lawyers. The terms of that settlement were not incorporated into any court-ordered consent decree (or even

incorporated in any order of dismissal) and the district court retained no jurisdiction to enforce the settlement's terms. Those terms were, essentially (i) that the plaintiff Jessica Rodriguez-Freytes[1] would sign a stipulation of dismissal of her case with prejudice and (ii) the defendant New York City Transit Authority would then pay the plaintiff a stated sum of money. When the stipulation of dismissal was filed in February 2001 (the dismissal became effective, under Fed. R. Civ. P. 40(a)(1)(ii), upon that filing), plaintiff applied to the district court for attorney's fees. Plaintiff's theory was that, by virtue of her getting through the settlement *some* of the relief prayed for in her original complaint (she had asked for $1,000,000 in compensatory damages as well as injunctive and declaratory relief, but settled for $41,518.60 without any injunctive or declaratory relief), she was, under the statutory provisions relevant to attorney's fees in Title VII actions and actions under 42 U.S.C. § 1983 (*i.e.*, 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988, respectively), a "prevailing party" and thus eligible for an award of reasonable attorney's fees.

While that application was pending, however, this Court issued its opinion in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). At the very beginning of that opinion, the Court stated:

> Numerous federal statutes [including those applicable to actions under Title VII and 42 U.S.C. § 1983] allow courts to award attorney's fees and costs to the "prevailing party." The question

[1] In the caption and in some places in the text of the Second Circuit's summary order, her last name is apparently misspelled as Rodriguez-Freytas.

> presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendants' conduct. We hold that it does not.

532 U.S. at 600. In light of that holding (and other language in the Court's *Buckhannon* opinion that noted that settlement agreements, unless incorporated into court-ordered consent decrees, lack the kind of judicial imprimatur sufficient to make the settling plaintiffs into prevailing parties), the Transit Authority urged the district court, under *Buckhannon*, to determine that Ms. Rodriguez-Freytes was not a "prevailing party" because the settlement's terms were not made part of any court-ordered consent decree or equivalent document giving the district court retained jurisdiction to enforce the settlement's terms in the future (and there obviously had been no judgment on the merits), and thus to deny the application for attorney's fees.

The district court (Gleeson, J.) ultimately rejected the applicability of *Buckhannon*, concluding that *Buckhannon* did not apply to actions "for money damages" (Petitioner's Appendix at App. 7).[2] The district court also concluded (assuming *Buckhannon* applied) that, because the terms of the settlement had been worked out with the assistance of a magistrate judge familiar with the case, that "level of judicial involvement" – notwithstanding that the magistrate judge never had *any* decretal power in that case –

---

[2] The district court overlooked the fact that the complaint in this case sought not only money damages but also declaratory and injunctive relief concerning the functioning of the Transit Authority's "restricted duty" policies as applied to pregnant women.

was sufficient to create "judicial imprimatur" on the settlement, making plaintiff a "prevailing party." *Id.* Judge Gleeson then awarded plaintiff attorney's fees in an order dated October 15, 2001. *Id.* (The amount of those fees was $14,712.50, which amount had been recommended by the magistrate judge in her report to Judge Gleeson concerning the application for attorney's fees.) The Transit Authority appealed from that order to the extent the order determined, notwithstanding *Buckhannon*, that plaintiff was entitled to reasonable attorney's fees.

In a summary order issued on April 27, 2004, the Court of Appeals for the Second Circuit vacated the district court's order awarding plaintiff attorney's fees because "[t]he instant case was . . . settled by an agreement negotiated by the parties" with "'[t]he district court never [having] granted [plaintiff] any relief on the merits," and "nor did 'the district court order a consent decree or endorse, or retain jurisdiction over, [the] settlement agreement.'" Transit Authority Appendix at A. 4. Thus, the Court of Appeals continued, "[a]ccording to *Buckhannon*, [plaintiff] cannot be considered a prevailing party, and is therefore not entitled to attorney's fees." *Id.* The Court of Appeals, in this respect, was clearly correct. We see nothing in *Buckhannon*, or in logic, that would support either the notion that *Buckhannon*'s view of "prevailing party" does not apply to cases in which a plaintiff sought, along with injunctive and declaratory relief, money damages (or settled only for money). And we see nothing in *Buckhannon*, or in logic, that would support the notion that, where a *voluntary* settlement between the parties is negotiated with the help of a magistrate judge (or an Article III district judge) but not then embodied in a consent decree or comparable order that the district court

would retain jurisdiction to enforce, such a (free-standing) *voluntary* settlement should be treated as if it were a *court-ordered* consent decree.[3]

REASONS WHY THE PETITION SHOULD BE DENIED

Ms. Rodriguez-Freytes's petition should be denied for several reasons. To begin with, the summary order that petitioner seeks review of in this Court is, under the Second Circuit's Rule (§ 0.23) concerning its summary orders,[4] and as the Second Circuit in fact wrote in capitalized bold print at the top of the summary order in this case (Transit Authority Appendix at A. 1), an order that "may not be

[3] The Court of Appeals, after vacating the order awarding attorney's fees, remanded to the district court so that – "[i]n the interests of fairness, and pursuant to 28 U.S.C. § 2106" – the plaintiff could choose to "cancel the settlement agreement and proceed toward an adjudication on the merits" because she had had a "reasonable . . . belie[f]," when she (through counsel) made the settlement agreement, that she would be entitled to attorney's fees as a prevailing party," and that belief turned out to be mistaken. Transit Authority Appendix at A. 5. In this respect, the Court of Appeals' summary order is worthy of review by this Court; such review is cross-petitioned for in the separately filed conditional cross-petition for a writ of certiorari being submitted by the Transit Authority.

[4] The Second Circuit's local Rule § 0.23 reads in relevant part as follows:

> Where disposition [of an appeal] is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, *they shall not be cited or otherwise used in unrelated cases before this or any other court.*

(Emphasis added.)

cited as precedential authority to this or any other court" (except "in a subsequent stage of this case, in a related case, or in any case for purposes of collateral estoppel or res judicata.") Petitioner does not explain why an *expressly* non-precedential decision merits further review by this Court to help resolve a split among the circuit courts.

Second, the Second Circuit's interpretation or application of *Buckhannon* as expressed in this case is not merely shared by one other court of appeals (as the petition suggests) but by every court of appeals (except the Ninth Circuit) that has addressed the matter of whether a voluntary settlement of litigation (without the settlement's terms becoming, or becoming the functional equivalent of, a court-ordered consent decree) can make the plaintiff a "prevailing party" for attorney's fee purposes. *See*, in addition to the Seventh Circuit's decision in *Petersen v. Gibson*, 372 F.3d 862 (7th Cir. 2004), which is cited in the petition, the decisions in *Alegria v. District of Columbia*, 391 F.3d 262 (D.C. Cir. 2004); *Doe v. Boston Public Schools*, 358 F.3d 20 (1st Cir. 2004); *Smalbein v. City of Daytona Beach*, 353 F.3d 901 (11th Cir. 2003); *Toms v. Taft*, 338 F.3d 519 (6th Cir. 2003); *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003); and *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002). We recognize that the Ninth Circuit seems to have accepted the notion that a settling plaintiff is still a "prevailing party" (for attorney's fees purposes) on the theory that pre-*Buckhannon* precedent (in that Circuit) as to settlements has not been affected by *Buckhannon* because (except to the extent *Buckhannon* concluded that a plaintiff that benefits from a defendant's voluntary legislative change of the laws or regulations that the plaintiff had sued to change is not a prevailing party) *Buckhannon*'s holdings – some of which

are set out at the beginning of the *Buckhannon* opinion, and quoted above – are really just "dicta," *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 n. 5 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002). We doubt that any court, other than this Court, may decide that what this Court calls a "hold[ing]" is not a holding but only "dicta." In any event, the Ninth Circuit's minority of one view has been often criticized (for instance, in *Doe*, 358 F.3d at 25) and should ultimately be corrected; but if the Ninth Circuit does not itself act to end its divergence from the views of the other courts of appeals, this Court might appropriately wait until a citable, precedential decision in direct conflict with *Barrios* reaches this Court.

Third, there is nothing in the language or the logic of *Buckhannon* that would exempt from its definition of, and holding concerning what is required to be, a "prevailing party" in fee-shifting statutes such as the statutes at issue in this case those lawsuits that seek monetary relief, let alone – as here – actions seeking monetary relief, and injunctive relief, and declaratory relief. As far as we are aware, in no case (except in the district court in this litigation) has the notion that such cases should be exempt from *Buckhannon* been accepted. And petitioner's argument that a settlement that requires a defendant merely to pay money would not need, or could not benefit from, a district court's retaining jurisdiction (through a court-ordered consent decree or equivalent order) to enforce such payment obligation is close to incomprehensible. In this case, in fact, the Transit Authority paid Ms. Rodriguez-Freytes the agreed upon sum some eight weeks *after* the stipulation of dismissal with prejudice (a stipulation that did not incorporate the settlement's terms or otherwise give the district court retained jurisdiction to enforce those

terms) had been filed. *If* the Transit Authority had, for some reason, declined to pay, surely having a district court judge with retained jurisdiction available to use the contempt powers of the court to compel payment would have been very useful for plaintiff, who otherwise would have had to commence a new action (and probably in state court for lack of diversity between the parties) for breach of contract, that is, breach of the settlement agreement. Such retained jurisdiction arises through a court-ordered consent decree, but there was no such document in this case.

Finally, there is no authority for the view (outside of the district court's order in this case) that a magistrate judge's – or an Article III district judge's – being helpful in facilitating a voluntary settlement, or recommending a particular settlement that the parties then voluntarily accept, is a kind of "judicial imprimatur" on the settlement that is comparable to the kind of "judicial imprimatur" that the Court in *Buckhannon* deemed necessary to make a plaintiff a "prevailing party," that is, comparable to a district court's ordering a consent decree. This view was not only rejected by the Second Circuit in this case, albeit *sub silentio*, but expressly rejected by the Sixth Circuit in *Toms v. Taft*, 338 F.3d at 529. This view, if adopted, would also discourage defendants from even participating in settlement discussions with magistrate judges or Article III district judges (*i.e.*, with judicial officers who might well be very helpful in moving the parties towards settlement), a result that could have disastrous effects on the district courts' ability to control their dockets through, among other means, voluntary settlements.

CONCLUSION

The writ of certiorari sought by petitioner in this case should be denied.

Dated: Brooklyn, New York
February 17, 2005

Respectfully submitted,

RICHARD SCHOOLMAN
Counsel of Record for Respondent
Office of Martin B. Schnabel,
General Counsel
NEW YORK CITY TRANSIT AUTHORITY
130 Livingston Street
Brooklyn, NY 11201
Tel. [718] 694-4667

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United Stated Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the day of two thousand and four.

Present: THOMAS J. MESKILL,
JON O. NEWMAN,
ROSEMARY S. POOLER,

Circuit Judges.

JESSICA RODRIGUEZ-FREYTAS,

Plaintiff-Appellee,

-v- (01-9443)

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

(Filed Apr. 27, 2004)

Appearing for Appellee: Leon Friedman, New York, NY.

Appearing for Appellant: Richard Schoolman, New York, NY.

Appeal from the United States District Court for the Eastern District of New York (Gleeson, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **VACATED AND REMANDED.**

We are asked on this appeal to review a judicial award of attorney's fees in the context of a civil rights action that was discontinued pursuant to a settlement agreement.

Plaintiff-appellant Jessica Rodriguez-Freytes commenced this action on August 18, 1999, by filing a complaint in the U.S. District Court for the Eastern District of New York. In her complaint, she alleged that the New York City Transit Authority ("NYCTA"), which employed her as a train operator, "ha[d] implemented a custom, policy and practice of removing pregnant train operators from active work shortly after learning that the individual is pregnant and despite the fact that the pregnant individual is not disabled, all of which is done because such train operators are pregnant. Similarly situated non-pregnant train operators are permitted to continue working." The complaint alleges that this amounts to discrimination in violation of the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

The parties eventually negotiated a settlement pursuant to which NYCTA would pay Ms. Rodriguez-Freytes back pay in the amount of $16,518.60, and damages for emotional distress in the amount of $25,000.00, for a total of $41,518.60. Judge Gleeson subsequently issued a "Settlement and Order of Dismissal," which acknowledged the settlement agreement and dismissed the action subject

to Ms. Rodriguez-Freytas's reservation of the right to apply for attorney's fees.

Ms. Rodriguez-Freytes subsequently moved for an award of attorney's fees pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k). In a Report and Recommendation, dated September 14, 2001, Magistrate Judge Azrack found that an award in the amount of $14,712.50 was appropriate. This figure was approved by Judge Gleeson in an Order, dated October 15, 2001 ("the October 15th Order").

Numerous federal statutes, including § 1988 and § 2000e-5(k), allow courts to award attorney's fees and costs to the "prevailing party." In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598 (2001), which was decided shortly before the October 15th Order was issued, the Supreme Court considered whether what is commonly known as "the catalyst theory" may serve as a basis for attorney's fees pursuant to these statutes. The catalyst theory asserts that a plaintiff may be considered a prevailing party in a case in which the defendant's voluntary action moots the lawsuit by providing the relief sought by the plaintiff.

The Supreme Court held that the catalyst theory may not serve as a basis of an award of attorney's fees because the phrase "prevailing party" does not "authorize[] federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit," achieves a desired result "without obtaining any judicial relief." 532 U.S. at 606. Judicial relief is relief that amounts to a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. Thus, "[a] defendant's voluntary change in conduct,

although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.*

In *Buckhannon,* the voluntary action which mooted the lawsuit was the defendant State's unilateral decision to repeal the regulations being challenged in the suit. *Buckhannon,* however, has been read by our Circuit to be applicable to situations in which a lawsuit is mooted by bilateral voluntary action, such as the conclusion of a settlement agreement among the parties which disposes of all issues raised by the suit. Thus, *Union of Needletrades, Industrial and Textile Employees v. INS,* 336 F.3d 200, 206 (2d Cir. 2003), involved a situation in which the parties "jointly reported [to the court] that they had 'settled all of the substantive issues in the case.'" We held that even though the plaintiff "may have accomplished the objective it sought to achieve by initiating" the lawsuit, "its failure to secure either a judgment on the merits or a court-ordered consent decree renders it ineligible for an award of attorney's fees under *Buckhannon.*" *Id.*

The instant case was also settled by an agreement negotiated by the parties. Although Ms. Rodriguez-Freytas received a monetary award pursuant to that settlement, it is uncontested that, as in *Needletrades,* "[t]he district court never granted [her] any relief on the merits," nor did "the district court order a consent decree or endorse, or retain jurisdiction over, [the] settlement agreement." 336 F.3d at 206. According to *Buckhannon,* she cannot be considered a prevailing party, and is therefore not entitled to attorney's fees.

We therefore vacate the October 15th Order. We are, however, sensitive to the fact that the settlement agreement

in this case was negotiated pre-*Buckhannon*, when it would have been reasonable for Ms. Rodriguez-Freytas to believe that she was entitled to an award of attorney's fees. In the interests of fairness, and pursuant to 28 U.S.C. § 2106, we therefore remand this action to the district court with instructions that it afford the parties an opportunity to re-negotiate the settlement agreement in the form of a consent decree over which the district court would retain jurisdiction for the purpose of enforcement. Should either of the parties decline this opportunity, Ms. Rodriguez-Freytas should be given the option to either: (1) cancel the settlement agreement and proceed toward an adjudication on the merits or (2) confirm the settlement agreement and forgo the attorney's fees awarded to her by the October 15th Order.

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby **VACATED AND REMANDED.**

FOR THE COURT:

Roseann B. MacKechnie,
Clerk of Court

By:

/s/ Lucille Carr
Lucille Carr, Deputy Clerk